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No. 99-869

In the Supreme Court of the United States

U S WEST COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission reasonably determined that the commercial arrangement into which petitioner entered with Qwest Communications violated Section 271 of the Communications Act of 1934, 47 U.S.C. 271.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-9a) is reported at 177 F.3d 1057. The order of the Federal Communications Commission (Pet. App. 10a-95a) is reported at 13 F.C.C.R. 21,438.

JURISDICTION

The judgment of the court of appeals was issued on June 8, 1999. A petition for rehearing was denied on August 24, 1999 (Pet. App. 96a-98a). The petition for a writ of certiorari was filed on November 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For many years, most telephone service in the United States—both local and long-distance—was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree—which became known as the Modification of Final Judgment, or MFJ—that required it to divest its local exchange operations. The newly independent Bell Operating Companies (BOCs) continued to provide monopoly local exchange service in their respective regions, while AT&T continued to provide nationwide long-distance service. The BOCs were initially grouped into several corporate entities known as "Regional Bell Operating Companies." See *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 141-142 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

The consent decree, overseen for many years by a federal district court in Washington, D.C., prohibited the BOCs from providing long-distance telephone service, manufacturing telecommunications equipment, and providing information services. In approving the restriction on long-distance service,[1] the district court

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[1] The district court divided the BOCs' collective geographical regions into approximately 160 exchange areas, known as "local access and transport areas" or "LATAs." See *United States* v. *Western Elec. Co.*, 569 F. Supp. 990, 993 (D.D.C. 1983). The relevant restriction in the consent decree permitted the BOCs to

explained that a BOC, if permitted to enter the long-distance market, could use its monopoly control over local bottleneck facilities (through which all calls must pass) to impede long-distance competition in two principal ways: The BOC could subject competitors to discriminatory terms of access to the local network, and it could cross-subsidize its own long-distance operations with its monopoly local revenues. *American Tel. & Tel. Co.*, 552 F. Supp. at 187-188, 223.

2. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, comprehensively overhauled the regulation of all telephone markets. In the "local competition" provisions of the Act, 47 U.S.C. 251 *et seq.*, Congress sought to open local markets to full competition for the first time by requiring all incumbent local exchange carriers (LECs), including the BOCs, to make their networks and services available to new entrants in three distinct but complementary ways. See 47 U.S.C. 251(c)(2)-(4). First, Section 251(c)(2) requires the incumbents to "interconnect" their networks with those of other carriers, and to do so "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Second, Section 251(c)(3) entitles potential competitors to lease elements of an incumbent's network, again at "just, reasonable, and nondiscriminatory" rates, terms, and conditions. Finally, Section 251(c)(4) gives potential

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provide telephone service "only between points within a single LATA, providing what is, basically, the traditional local telephone service." *United States* v. *Western Elec. Co.*, 969 F.2d 1231, 1233 (D.C. Cir. 1992), cert. denied, 507 U.S. 951 (1993). For ease of exposition, we refer to inter-LATA calls in the vernacular: as "long-distance calls." Such calls should not be confused with the somewhat larger category of "toll calls," which includes some *intra*-LATA calls that the decree permitted the BOCs to carry.

competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users.

Congress also enacted a set of provisions—applicable to the BOCs and "any successor or assign" (47 U.S.C. 153(4)(B))—that "as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing * * * a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *BellSouth Corp.* v. *FCC*, 144 F.3d 58, 66 (D.C. Cir. 1998), cert. denied, 119 S. Ct. 1495 (1999). The most basic of those provisions is Section 601(a) of the 1996 Act, 110 Stat. 143, which terminates the prospective effect of the AT&T consent decree. In place of the decree, Congress created a transitional regulatory framework governing the BOCs' entry into certain new markets, both to ensure orderly progress towards full competition in telecommunications and to give the BOCs a strong incentive to facilitate the realization of that goal.

Section 271, 47 U.S.C. 271, governs BOC entry into the long-distance market. That provision introduces a procedure under which the BOCs may apply to the FCC for authorization to provide, for the first time, full long-distance telephone service to customers within their "in-region" States. The FCC is to grant a BOC's in-region long-distance application if it finds the following (47 U.S.C. 271(d)): (1) that the BOC has satisfied certain statutory requirements designed to open its local exchange market to competition (47 U.S.C. 271(c)); (2) that, for an interim period, the BOC will conduct its long-distance operations in accordance with the struc-

tural separation requirements of 47 U.S.C. 272;[2] and (3) that granting the application would serve "the public interest, convenience, and necessity" (47 U.S.C. 271(d)(3)). Because no BOC (or BOC affiliate) "may provide interLATA services except as provided in [Section 271]" (47 U.S.C. 271(a)), this statutory scheme gives the BOCs important incentives to open their local markets to competition. See generally Pet. App. 6a-7a; *SBC Communications, Inc.* v. *FCC*, 138 F.3d 410, 413 (D.C. Cir. 1998).[3]

3. Petitioner, a BOC, has not requested authorization under Section 271 to provide interLATA service in any State within its region. In 1998, however, petitioner negotiated an arrangement with Qwest under which petitioner offered a package of local and long distance services with the brand name "U S WEST Buyer's Advantage," and Qwest paid petitioner a fixed fee for each customer that signed up. Pet. App. 2a. Petitioner's involvement in the joint service offering was pervasive. For example, petitioner made the initial contact with potential customers and continued to serve as the primary point of contact for the subscribers to the Buyer's Advantage program; a customer interacted

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[2] Section 272 requires the BOCs to set up separate affiliates if they wish to engage in origination of most non-incidental in-region long-distance services. 47 U.S.C. 272(a) and (b); see also 47 U.S.C. 272(f) (sunset provision).

[3] Several BOCs have submitted applications under Section 271 for authorization to provide in-region long distance service. Although the Commission has denied several such applications, it recently granted Bell Atlantic's application to provide long-distance service in New York. See *Application of Bell Atlantic-New York*, FCC No. 99-404 (Dec. 22, 1999), petitions for review pending *sub nom. AT&T Corp.* v. *FCC*, No. 99-1538 (D.C. Cir.), and consolidated case.

with Qwest only after petitioner had determined that the customer's concern related to an issue with Qwest's long distance network. *Id.* at 67a. And petitioner preserved for itself the exclusive right to market Qwest's long distance service in conjunction with the marketing and selling of its own services. *Id.* at 62a.

Petitioner's internal marketing plans stated that the Buyer's Advantage program "will initially allow [petitioner] to become an interLATA carrier for customers." Pet. App. 32a. Petitioner further stated that the program was designed not only to retain and regain intraLATA toll customers, but also to "[p]re-position customers for U S WEST Long Distance by providing the convenience of one-stop shopping." *Ibid.* In other words, petitioner intended to identify itself in customers' minds as a long distance service provider—and thus to gain a foothold in the long distance market even though it had neither sought nor obtained authorization under Section 271. Indeed, in marketing the Buyer's Advantage program, U S WEST did not always clearly identify Qwest as the long distance service provider. Representations to potential subscribers, for example, stated that "U S WEST Communications has teamed up with Qwest to provide you and your company long distance service." *Id.* at 34a n.70. And petitioner's marketing materials further notified potential customers of "U S WEST's Buyer's Advantage, a new long distance service available to our customers" and thanked customers for calling "U S WEST Communications, your local, long distance and inter-net provider." *Ibid.*[4]

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[4] Ameritech Corporation, another BOC, developed a similar agreement with Qwest. Pet. App. 26a-32a. Following the decision below, Ameritech stipulated in settlement of a lawsuit that its

4. a. Petitioner's Buyer's Advantage program sparked immediate controversy. In May 1998, a group of interexchange carriers and competitive local exchange carriers filed suit in the Western District of Washington, challenging the program's legality. In June 1998, at the FCC's suggestion, the district court referred the case to the FCC under the doctrine of primary jurisdiction. The court also granted a request for preliminary injunctive relief, finding that "the plaintiffs have shown serious questions going to the merits and a balance of hardships tipping sharply in their favor." *AT&T Corp.* v. *U S WEST Communications, Inc.*, No. C98-634WD (W.D. Wash. June 4, 1998), slip op. 3.

b. In October 1998, the Commission unanimously found that petitioner's arrangement with Qwest violated Section 271(a), which, as noted, forbids any BOC to "provide interLATA services" except as provided elsewhere in Section 271. The Commission observed that both sides had argued that the term "provide" (which the Act does not define) is clear, but that each had offered an opposite meaning. Pet. App. 41a. Petitioner argued that Section 271(a) should be read narrowly to encompass only the actual transmission of service. *Id.* at 43a. In contrast, the interexchange carriers and competing local exchange carriers argued that the term "provide" generally means "make

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arrangement with Qwest *was* a violation of Section 271; both Ameritech and Qwest agreed to comply with the Commission's decision, and they waived any rights to seek review of that decision. *AT&T* v. *Ameritech*, Stipulation of Disposition and Permanent Injunctive Relief, No. 98 C 2993 (N.D. Ill. Oct. 22, 1999).

available." *Id.* at 41a.[5] The Commission found the term ambiguous, *id.* at 45a, and concluded that the statutory structure and the legislative history supported a reading substantially broader than petitioner's. See *id.* at 45a-54a.

As the Commission observed, Section 271(a) was intended to promote "local and long distance competition by prohibiting BOCs from full participation in the long distance market until they have open[ed] their [local] markets." Pet. App. 48a. The Commission thus found that the term "provide," as it appears in Section 271(a), denotes a level of participation in the provision of long distance service that would "undermine Congress' method of promoting both local and long distance competition." *Ibid.* The Commission noted that the 1996 Act neither expressly allows nor prohibits all forms of marketing relationships. *Id.* at 53a. But the Commission concluded that *this* marketing arrangement did violate Section 271, because it enabled petitioner "to obtain material benefits uniquely associated with the ability of the BOCs to include a long distance component of service." *Id.* at 55a. For example, the arrangement allowed petitioner, in violation of congressional intent, to become a one-stop shopping source before it had adequately opened its market to competition—and thus before other providers could compete in the combined services market. *Id.* at 55a-56a.

The Commission also found that petitioner was holding itself out as a provider of long distance service. Pet. App. 55a. The Commission based this conclusion in

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[5] The Commission noted that each of the two sides had taken the opposite position when the meaning of the term had arisen in another context. See Pet. App. 47a n.114.

part on the fact that petitioner was selling local and long distance services under its brand name and was performing customer care functions in conjunction with the long distance portion of the "U S WEST Buyer's Advantage" package. *Ibid.* Moreover, petitioner was performing functions that are typically performed by parties that resell interLATA services, including customer care and establishing prices and terms of service. *Ibid.*

c. The court of appeals denied the petition for review. Pet. App. 1a-9a. The court held that "[t]he statutory term 'provide' appears to us somewhat ambiguous in the present context," *id.* at 2a, and that the Commission's interpretation of it here was "clearly reasonable," *id.* at 6a. The court observed:

> [T]he FCC found that the arrangements here would have afforded the BOCs in question a serious advantage, namely, a "first mover's advantage" over any non-BOC firms hoping to secure a position in the anticipated full-service market. By offering one-stop shopping for local and long distance under their own brand name and with their own customer care, [petitioner] and Ameritech could build up goodwill as full-service providers, positioning themselves in these markets before § 271 allows them actually to enter. There appears to have been specific congressional concern over the impact of jointly marketed local and long distance service. * * * If the BOCs could secure this advantage without opening their local service markets, the blunting of the intended incentive would be considerable—or so the Commission could reasonably find.

Id. at 7a (citations omitted). The court further endorsed the Commission's decision to proceed on a case-

by-case basis in determining whether a BOC's involvement in interLATA service violates Section 271(a). *Id.* at 9a.

ARGUMENT

1. The court of appeals correctly determined that Congress has not "directly spoken to the precise question at issue" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984))—and that, under *Chevron*, the Commission's application of Section 271(a) in this case must be upheld if it is reasonable. Petitioner's claim, reduced to its essentials, is that Congress *has* spoken directly to the precise question at issue, because the term "provide," as used in Section 271(a), can only mean "transmit" (Pet. 19) and cannot possibly denote offering long-distance service to the public through the sort of joint service arrangement at issue here. That claim is without merit, and this case warrants no further review.[6]

The Commission found that petitioner's special relationship with Qwest was unlawful not because the BOCs are always barred from any "involvement" in the long-distance market (cf. Pet. 2), but because this parti-

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[6] This case is unworthy of certiorari for a separate, threshold reason as well. Because petitioner and Qwest seek to merge, they could not currently enter into the kind of arrangement at issue here even if they were to prevail on the question presented. See Pet. 8-9 n.7; see also Pet. 28 (conceding that Section 271 prohibits "a teaming agreement that pays a BOC a percentage of an 'unaffiliated' carrier's long distance revenue"). That fact would make this case an exceptionally odd vehicle for reviewing any issue, even though petitioner suggests (Pet. 8-9 n.7) that Article III jurisdiction technically remains because, in a separate proceeding, it has been sued for damages for engaging in the activities in question here. See generally *Taggart* v. *Weinacker's Inc.*, 397 U.S. 223, 224-225 (1970).

cular relationship would have "undermine[d] Congress' method of promoting both local and long distance competition." Pet. App. 48a. The Commission observed that, under that arrangement, petitioner sought to "obtain material benefits uniquely associated with the ability of the BOCs to include a long distance component of service," such as one-stop shopping, "before demonstrating that [its] local markets are open to competition"; that it held itself out as a provider of long distance services "by marketing and selling, under a single brand name, Qwest's long distance services and [its] own local services and by performing various customer care functions in connection with long distance services"; and that it performed "various functions and activities under [its] business arrangements with Qwest that are typically performed by those who resell interLATA services, such as marketing, customer care, and establishing the prices, terms and other conditions for the long distance services to be provided." *Id.* at 55a.

Given those findings, the Commission concluded that petitioner had unlawfully "provided" long-distance services to end users in violation of Section 271(a). That determination was "clearly reasonable," as the court of appeals observed (Pet. App. 6a), and was properly tied to the specific facts of this case (*id.* at 8a-9a). Despite petitioner's unsupported assertion to the contrary (Pet. 19), it is entirely natural to speak of the closely knit commercial arrangement at issue here as enabling petitioner to "provide" long-distance service to its customers; in fact, petitioner's contrary reading, which would exclude that natural meaning, is quite strained. Moreover, as the court of appeals indicated, petitioner's approach is difficult, if not impossible, to square with the statutory scheme, because it would

threaten the "specific congressional concern over the impact of jointly marketed local and long distance service." Pet. App. 7a. Finally, despite petitioner's repeated assertions to the contrary (*e.g.*, Pet. 22), the Commission reasonably concluded that Congress enacted Section 271 in part to give the BOCs an important incentive to open their local markets to competition. See Pet. App. 6a-7a; see generally *SBC Communications, Inc.* v. *FCC*, 138 F.3d 410, 412-413 (D.C. Cir. 1998).[7]

2. Petitioner also seeks to ratchet its statutory construction argument up a level of significance, claiming that this case somehow implicates the nondelegation doctrine. As an initial matter, that claim is not properly before this Court, because petitioner did not raise it in the court of appeals (at least until its petition for rehearing), and that court therefore did not address it.

In any event, the claim is implausible. As this Court has recognized in *Chevron* and its progeny, Congress commonly leaves gaps for agencies to fill; such gaps often take the form of ambiguous statutory language, and this Court has routinely endorsed an agency's resolution of such ambiguities as an important and legitimate exercise of its delegated authority. Although petitioner criticizes the FCC for noting the many ambiguities in the 1996 Act (Pet. 13 n.17), this Court has itself characterized that Act as "a model of ambiguity or indeed even self-contradiction." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). The Court did

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[7] Petitioners renew their arguments based on inferences from "parallel provisions of the Act." Pet. 19. Those arguments are unsound for the reasons identified by the court of appeals. See Pet. App. 3a-8a.

not suggest, however, that such ambiguities raise any issue under the nondelegation doctrine; indeed, it reaffirmed that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Ibid.*

Petitioner nonetheless asserts that Section 271(a) is not ambiguous at all, that the court of appeals agreed that the Commission had "manufactured" an ambiguity (Pet. 14), and that the court nonetheless "felt bound" to "acquiesce" (Pet. 3) in a lawless agency usurpation of congressional authority. That is incorrect. The court of appeals in fact agreed with the Commission that the applicable statutory language is "somewhat ambiguous" (Pet. App. 2a), affirmed the Commission's interpretation of Section 271(a) as "clearly reasonable" (*id.* at 6a), and squarely rejected petitioner's claim that the text of the 1996 Act compels a contrary result (*id.* at 6a-7a).[8] The D.C. Circuit is quite capable of rejecting an agency's statutory interpretation on the ground that "Congress has directly spoken to the precise question at issue" (*Chevron*, 467 U.S. at 842). Here, however, the court straightforwardly found that Congress had *not* directly spoken to the issue. Finally, there is no merit to petitoner's suggestion (Pet. 27-29) that Congress left the Commission without any "intelligible principle" (*Mistretta* v. *United States*, 488 U.S. 361, 372 (1989)) to apply in resolving that issue. As the court of

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[8] Petitioner repeatedly contends that the court of appeals "was 'puzzled' by the FCC's statutory interpretation" and that it found that the Commission's construction "could be 'nonsensical' in certain circumstances." Pet. 3; see also Pet. 12, 25. That is a substantial mischaracterization of the court's opinion. Although the court questioned a minor "detour" in the Commission's analysis (Pet. App. 9a), it could not have been clearer in endorsing the reasonableness of the Commission's decision as a whole.

appeals observed (Pet. App. 6a-7a), the Commission's order closely tracked the statutory objectives of the 1996 Act.[9]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2000

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[9] Petitioner lays curious emphasis (see Pet. 3, 26-27) on the D.C. Circuit's recent application of the nondelegation doctrine in *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999), modified in part, 195 F.3d 4 (D.C. Cir. 1999). That decision not only was issued by the same court as the decision below, but was also written by the same judge, and indeed the panels hearing the cases shared two out of three judges; moreover, the principal opinion in *American Trucking* was issued only several weeks before the decision below. The court's failure to perceive any comment-worthy relationship between the two cases was not the result of oversight.